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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1198

RELIANCE INSURANCE COMPANY, *Petitioner*

v.

BLOUNT BROTHERS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Reliance Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A, *infra*, pp. 1a-19a), is as yet unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1967. Upon motion by petitioner the mandate has been stayed until March 27, 1967, or until such time as action is taken upon this petition. Jurisdiction is based on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the appellate Court err in rejecting the main basis on which the appeal was taken, for the purpose of weighing the facts as disclosed by the entire record, and thereafter substituting its factual opinions for those of the Jury; and if so did such action violate the provisions of Rule 50(a) and (b), Federal Rules of Civil Procedure, as well as the Seventh Amendment of the Constitution.

STATUTES INVOLVED

Rule 50(a) and (b) of the Civil Rules of Procedure in Federal Courts; Article Seven of the Constitution of the United States. (Appendix "B", *infra,* pp. 19a-20a)

STATEMENT

Involved here is a subcontract for the performance of certain painting work under a prime contract covering the construction for the United States of a nuclear reactor located in Montgomery County, Maryland. The prime contract, dated April 25, 1963, was to be performed by Blount Brothers Corporation of Montgomery, Alabama; and the subcontract, dated August 2, 1963 was to be performed by William Dunbar Company, Inc., of Brentwood, Maryland, and was in the amount of $90,000.00.

Standard Accident Insurance Company (now Reliance Insurance Company, hereinafter referred to as "Reliance") wrote a bond covering performance of the contract naming Blount Brothers Corporation ("Blount") as obligee, and William Dunbar Co., Inc., ("Dunbar") as principal.

After a substantial amount of the painting work had been performed, but prior to completion of all the work; Blount declared Dunbar in default, and terminated the painting subcontract. This was in a letter dated November 23, 1964, and on the same date a similar letter was directed to Reliance demanding that it immediately take over completion of the subcontract work. In fact a response was demanded within 48 hours. (R. 113-114) Four days later, on November 27, suit was instituted by Blount in the United States District Court for the Middle District of Alabama, Northern Division, by filing a Complaint with the Clerk in Montgomery, Alabama, with a demand for a jury trial. (R-1) The completion date for the prime contract when these events occurred was April 1, 1965. (R. 115)

There followed a motion for a change of venue to the United States District Court for Maryland filed by defendant Reliance on January 21, 1965 (R. 15), which was opposed by Blount, and which was denied on February 1, 1965. (R. 26) Thereafter a motion for a stay and dismissal of the Complaint was filed by Reliance on April 21, 1965, on the ground the subcontract required arbitration of the dispute, but this motion was opposed by Blount, and was denied by the Court orally on April 21st, and later formally on April 23, 1965, the trial having commenced on April 22, 1965. (R. 36)

The trial lasted four full days, comprises 804 pages of testimony 102 exhibits, at the conclusion of which

both sides moved for a directed verdict, which was taken under advisement. (R. 935-937) Thereafter, Reliance submitted proposed instructions for the jury, but none were submitted by Blount. (R. 937-938) Subsequent to the Court's charge to the jury Reliance excepted to the extent its proposed instructions were not included in the charge, but no exceptions were taken by Blount. (R. 969-970) On April 27, 1965, the jury found for Reliance in the following terms: "We the jury find the issues in favor of the defendant." (R. 977)

On May 5, 1965, Blount filed a motion for judgment notwithstanding the verdict and for a new trial, both of which were denied on June 11, 1965. (R. 981-985) Blount filed its Notice of Appeal on June 18, 1965 (R. 986), the case was argued on November 4, 1966, and on January 11, 1967, the Court of Appeals entered its judgment reversing the judgment of the District Court denying Blount's motion for judgment, *non obstante verdicto,* and remanding the case for a "determination of the amount of damages resulting from the breaches of the subcontract for which the appellee bonding company made itself liable."

REASONS FOR GRANTING THE WRIT

Blount presented its appeal on the sole ground that because of what it termed judicial admissions of counsel for Reliance, as well as what it described as admissions by its principal witness, there was an admitted breach of contract by Reliance, leaving nothing for the Jury to decide. The main question presented to the appellate Court by the appellant was, whether a compensated surety's bond conditioned on faithful performance of terms and conditions of a construction

subcontract is broken by the admitted failure of principal to perform its contract. The appeal was met on this ground by Reliance; and both in its brief, and in its oral argument, it sought to show that there was no such admission.

The Court below refused to accept the appeal on this ground, saying there were no such admissions, and that the argument of Blount was too glib; the Court also said that the argument of Reliance was too bland, thus making it necessary for the Court to read the entire transcript of testimony (988 pages), and the more than 100 documentary exhibits, to see whether there was any evidence on which the jury could have based its verdict. (App., pp. 2a-3a) In its opinion the Court below then proceeded to discuss all the evidence of record, at great length, and reached the conclusion the verdict of the jury should be set aside. The Court did not decide to set aside the verdict because there was no evidence to support it (the usual test) but because, in its opinion, after weighing all the testimony and exhibits, "there was no evidence to warrant submission of the excuses for non-performance to the jury, because none of this evidence was sufficient as a defense to the requirements of the general terms of the contract and the specific terms of the subcontract." (App., p. 18a)

II

The basic error of the lower Court lies in the fact that it was unwilling to accept either the verdict of the jury, or the legal theory of Blount, but instead felt free to study the entire record for the purpose of making its own factual findings, and for the purpose of spelling out its own legal theory of the case.

Blount appealed on the sole ground that as a result of admissions by Reliance and its counsel, there were no disputed issues to go to the Jury. The Court below finds that there are no such admissions. It then proceeds to discuss the entire record, at length, and decides, according to what it regarded as the crucial legal issues in the case, not that there was no evidence to support the verdict of the Jury, but that there was no evidence to warrant submission of the excuses for nonperformance to the Jury. It is suggested that this is a clear-cut violation of Rules 50(a) and (b) of the Federal Rules of Civil Procedure, as well as the provisions of the Seventh Amendment to the Constitution.

This petition is not the proper place to comb through the opinion of the lower Court to show that many of its factual conclusions are not supported by a preponderance of the evidence of record, as they should be, since the action of the Court is in effect a ruling for the plaintiff, nor to show that the lower Court did not understand where Reliance placed its emphasis in presenting its case to the District Court, and to the Jury.

It is pertinent to show, however, that the decision on its face reveals that there were issues of fact that the jury was entitled to decide. For example, one of the main arguments of Reliance was that the concrete surfaces, for which Blount was responsible, were never at any time in a condition that would enable Dunbar to proceed with the painting. Ample evidence was submitted in support of this point (App., p. 7a; R. 584-844; 884-893). Moreover, the argument was never entirely rejected by the Court. Rather it was said that any failures by Blount on this score were either unimportant, or had been overcome by a new method of ap-

plication suggested by a new paint manufacturer located by Dunbar prior to termination. (App., p. 18a)

There are many other indications of a weighing of the evidence on the part of the Court. In discussing whether Dunbar offered any evidence justifying its alleged failure to perform some other items mentioned in the contract, the Court states, "There is some dispute * * *," about how Dunbar submitted certain paint samples, "but we think this unimportant." (App., p. 10a) Another indication of the weighing of the factual issues, appearing on the face of the decision, is the statement that "Dunbar's defense is, rather, that its compliance was excused either because the surfaces were not ready for its work, or that final compliance was required in too short a time." (App., p. 12a)

The discussion contained in the decision shows that beyond question the Court below was weighing the evidence to decide whether in its opinion the Jury was right or wrong, and the decision, on its face, shows further that in this instance the Court was acting in excess of the authority it has for this particular purpose.

III

The decisions dealing with Rule 50(b) have established the doctrine that the verdict of a jury should be treated with the utmost caution, and should be set aside only in most extreme cases. Indeed, in one case this Court said that in view of the Seventh Amendment to the Constitution guaranteeing a jury trial in suits at common law, the trial court had no power to set aside a verdict. *Slocum* v. *New York Life Ins. Co.,* 228 U.S. 364, 57 L. Ed. 879. This view was later modified in *Baltimore and Carolina Line* v. *Redman,* 295 U.S. 654,

79 L. Ed. 1636; and the terms of the latter decision have now been incorporated into Rule 50 of the Civil Rules of Procedure in Federal Courts.

The doctrine that has been developed is well-stated by this Court in *Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U.S. 29, 34, 88 L. Ed. 520, 525: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Or as was said by the Court of Appeals for the Fifth Circuit in *Marsh* v. *Illinois Central R. Co.*, 175 F. (2) 498, 500, Cir. 5,

> "While it is not our function to weigh the evidence, we do agree with the trial judge's first expressed opinion that the weight of the evidence is 'overwhelmingly against the plaintiff.' But we do not agree that the grant of a judgment notwithstanding the verdict was therefore justified. There was evidence of the appellant, not very explicit or positive, which if believed might authorize a jury to conclude he was hurt in the manner he claims. Because the trial judge does not believe it, because of appellant's own contradictions and conduct and of opposing evidence which seems to overwhelm it, is not ground for a judgment notwithstanding the verdict, and we must reverse that judgment." *Howard* v. *Louisiana & A. R. Co.*, 5 Cir., 49 F. (2) 571.

In its decision in this case the Court below acknowledges the existence of the foregoing doctrine (App., p. 12a), but the decision does not give it effect.

Indeed, there are indications in the decision that although the Court was aware of the rule applicable to motions NOV, it was not prepared to observe its re-

strictive effect in this particular instance. There is at least one indication on the face of the decision that the Court felt it was within its power to exercise a certain degree of discretion in weighing the evidence. It is said at one point that, "There can be no serious dispute between the parties as to the standard by which an appellate Court must review the refusal of a trial court to grant a motion for a judgment notwithstanding a verdict by a trial jury, or the denial by a trial court of a motion for a new trial." (App., p. 12a) The decision then proceeds to discuss precedents relating only to motions for a directed verdict, as if the tests were the same. The test applied by a Judge in granting a new trial is not the same as applied to a motion NOV. The new trial motion invokes a considerable amount of discretion on the part of the trial court; the motion NOV does not. If the Court below was under the impression that the same test applies to both, this may explain its willingness to weigh all the evidence, the entire record, as it seems to have done in passing upon the correctness of the jury verdict.

IV.

In many respects the decision indicates the Court did not understand the theory of the Reliance case; and that it was in error in the way it applied certain legal principles, aside from those directly bearing on the motion NOV.

(a) It has chosen to characterize the presentation of Reliance as one in confession and avoidance, a term taken from the common law. (App., pp. 13a-14a) Later it is said,

> "Appellee defends largely upon the concept that its bonded contractor had undertaken a very diffi-

> cult subcontract which it was attempting, to the best of its ability, to carry out at the time of termination. A second defense is that at the time of termination others were at fault for the failure of Dunbar and Company to satisfy the requirements imposed on it by the subcontract."

Reliance did not plead, in effect, confession and avoidance. And it did not vaguely state "others" were at fault. (R. 584-844) It argued throughout the case that Blount was directly responsible for any non-performance on the part of Dunbar, not "others," and that this being so Dunbar was directly prevented from performing by the opposite party to the case. Blount prevented performance by failing to deliver adequate concrete surfaces, and, by failing to promptly submit the Dunbar paint samples to the Government. (R. 656) Since Dunbar had no privity with the United States, it could not do so itself. This does not constitute a confession and avoidance situation. Rather it is one where the performance by one was prevented by the interference of the other party to the contract.

(b) It will also be noted that the Court rejects the Reliance argument about the faulty paint design of the Government, on legal grounds, saying such a faulty design avails Reliance nothing in this proceeding. But the lower Court is wrong about this, since Dunbar is bound under its subcontract only to the extent that Blount is bound to the Government. And it is well-settled that if the design here was wrong, if it had to be changed to permit its use, as was the case here, Blount was free to disregard the original specifications, if it saw fit. Dunbar as the subcontractor would have the same right, if it had cared to exercise it, which it did not. *United States* v. *Spearin*, 248 U.S. 132, 63 L. Ed. 166.

(c) The Court also places great stress throughout the decision on the fact that subsequent to the termination date of November 23, 1967, Dunbar made a further effort to avert the termination by appearing at the job site ready for work. (App., p. 16a) What Dunbar may have done or not have done subsequent to the termination can have no relevance. The sole question for the Jury was whether the termination was justified when it occurred.

V

Blount issued what the Court below has termed an ultimatum, (App., p. 8a), on ten days notice. The terms of the ultimatum are contained in footnotes to the decision (App., pp. 8a-10a); and even a casual reading will convince that it would be impossiple to meet its terms within a ten-day period.

This makes it necessary to consider what preceded the ultimatum. Was Blount justified in issuing the ultimatum when it did, or did it, by its own previous actions, create the situation, or contribute to the situation, as it existed when the ultimatum was rendered.

It is suggested that the evidence shows, Blount was largely responsible for Dunbar's difficulties (1) because it did not provide concrete surfaces that could be painted and (2) because by failing promptly to submit paint samples to the Government, and otherwise to adequately represent Dunbar's interests with the Government, with whom Dunbar was not in privity, it became impractical for Dunbar to make the progress he desired. These are just some of the reasons shown by the evidence. (R. 584-844).

Under these circumstances and having been responsible for things as they existed, or having substantially

contributed to the difficulties, Blount had no legal right to suddenly issue an ultimatum providing ten-days notice prior to termination. At least the jury was entitled to reach such a conclusion.

When the Court below decided to minimize all of the record preceding the issuance of the ultimatum, as the discussion in the decision seems to do, it fell into serious error.

The entire attention of the Court below focuses on the terms of the ultimatum, and what Dunbar did to comply with its terms. Not much weight is given by the Court to the way in which Dunbar's efforts were thwarted by Blount; or indeed, whether Blount was entitled to make many of the demands contained in the ultimatum by the express or implied terms of the subcontract and the specifications. This was reversible error.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

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